IN THE

Supreme Court of the United States

No. 71-322

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH, for Exoneration
From or Limitation of Liability as Owner
of the M/S BREMEN

UNTERWESER REEDEREI, GMBH
Petitioner,
v.
ZAPATA OFFSHORE COMPANY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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PRELIMINARY STATEMENT

Unterweser's references to the parties and the record in this reply brief are consistent with references utilized in its main brief. Unterweser will reply seriatim to the issues raised by Zapata.

REPLY TO STATEMENT OF FACT

It must be emphasized that no court has made any determination on the merits of this case. Zapata, through use of "contentions" and "factual allegations" seeks to establish negligence by presupposition.[1] The

[1] Zapata even concludes its brief on this false note: "Surely 'comity' does not require the district court to stay Unterweser's limitation action so as to send Zapata to a forum where it cannot recover for Unterweser's *negligence.*" (Zapata Brief, 47) (emphasis added).

thrust of Zapata's argument is that Unterweser should be punished for its presupposed negligence by refusal to give effect to the forum provision in the Towage Contract.

Unterweser has valid defenses as to the merits of Zapata's claim, and Unterweser's contentions and factual allegations conflict with those of Zapata. Neither Zapata's nor Unterweser's allegations and contentions on the merits are before this Court, nor are they material or relevant to the issues involved in this appeal, and discussion of the substantive contentions of each party serves no useful purpose.

REPLY TO POINT I

A. Unterweser Properly Preserved Its Position In The District Court And Undertook No Acts Which Would Preclude It From Insisting That The Towage Contract Be Enforced.

On January 29, 1968, Unterweser filed its first pleading in the initial action—its motion to dismiss, or alternatively, for entry of an order declining jurisdiction or staying the prosecution of the initial action. (A. 19). Upon filing that motion, Unterweser's right to contest the propriety of the Tampa forum was protected. Rule 12, Federal Rules of Civil Procedure; *Neifeld v. Steinberg,* 438 F.2d 423 (3rd Cir. 1971); *Hasse v. American Photograph Corporation,* 299 F.2d 666 (10th Cir. 1962); *Blank v. Bitker,* 135 F.2d 962 (7th Cir. 1943); *Beaunit Mills Inc. v. Industrias Reunidas F. Matarazzo,* 23 F.R.D. 654 (S.D.N.Y. 1959); *Heiss v. Nielsen,* 132 F.Supp. 541 (D. Neb. 1955); *Baltimore & O. R. Co. et al v. Thompson et al,* 80 F. Supp. 570 (E.D. Mo. 1948).

In view of circumstances existing during the early stages of the initial action, and by the very nature of a

limitation proceeding as hereinafter discussed, Zapata's waiver argument is without merit. From the outset, Zapata has laboriously detailed its own efforts in this litigation, the number of depositions which it took and in which Unterweser was represented, and the fact that Unterweser also noticed and took depositions. Zapata ignores that Unterweser initially endeavored to have the depositions of crew members of BREMEN postponed until the District Court had disposed of Unterweser's motion to dismiss or decline jurisdiction.

On January 29, 1968, Unterweser also moved for a protective order seeking to have the *de bene esse* depositions of BREMEN crew members terminated, asserting therein its motion to dismiss or decline jurisdiction. (A. 29). Zapata countered by moving on the same date for an order compelling Unterweser to continue the *de bene esse* depositions. (A. 31). The District Court heard oral argument on these two motions on the date they were filed, and on January 30, 1968, ruled *ore tenus* that the depositions should continue.[2] Unterweser, in arguing its motion for protective order, advised that Zapata's claim could well be tried in some other forum, and in such event the utility of the depositions would be questionable,[3] and that in any event, it would be necessary for Unterweser to redepose many of the same witnesses at some future date after Unterweser had had an opportunity to familiarize itself with the facts and issues of Zapata's claim.

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[2] The proceedings before the District Court on January 29 and 30, 1968 were transcribed and filed in the initial action on February 15, 1968, (A. 2) which record was destroyed by a fire in the Clerk's office. (See Preliminary Statement to Appendix).

[3] Subsequently, in oral argument on its motion to dismiss or decline jurisdiction, Unterweser unilateraly stipulated that the depositions and discovery which had been accomplished in the early stages of the initial action could be used in London.

In summary, Zapata's "waiver" argument is dispelled by circumstances and invalidated by precedent.

B. Unterweser, In Its Complaint For Limitation, Preserved Its Legal Position; Did Not "Submit" The Controversy To The District Court; And Did Not "Waive" Its Right To Seek Enforcment Of The Forum Provision.

Although recognizing that Unterweser "reluctantly" filed its limitation action, the Court of Appeals held that Unterweser had submitted itself to the jurisdiction of the District Court for the resolution of the entire controversy, and subjected itself to the "full equitable powers of the district court." (A. 237). The decision does not deal with the prejudice caused by the *six month delay* between the filing of Unterweser's motion to dismiss or decline jurisdiction (A. 19) and the entry of the District Court's order on that motion (A. 80); it ignores that a complaint in limitation is defensive; and it fails to consider that Unterweser carefully preserved its legal position in its complaint for limitation. (A. 85).

Zapata argues that irrespective of when the District Court entered its order on Unterweser's motion to dismiss or decline jurisdiction, the six month period specified in 46 U.S.C. §184, 49 Stat. 1480, would have continued to run, and Unterweser would have had to decide, before July 12, 1968, whether or not to file a complaint in limitation. (Zapata Brief 18-19). Had the District Court ruled on Unterweser's motion to stay the initial action within even two or three months after it was filed on January 29, 1968, Unterweser would have had sufficient time to have the order certified pursuant to 28 U.S.C. §1292, 72 Stat. 1770, in order to appeal the District Court's decision *before* it became necessary to consider whether to file a limitation action in the United

States.[4] Such an appeal would have facilitated determination of enforceability of the forum provision without the encumbrance of collateral issues.

A complaint in limitation is defensive. (Wisdom J., dissenting, A. 288, n.5.) Unterweser, by filing the limitation action did not concede liability; at most, Unterweser "invoked" or "preserved" a *defense* within a few days before the right to do so expired, and at a time when it was not known whether the District Court would grant or deny its initial motion. Since a party, under Rule 12, Federal Rules of Civil Procedure, can protect defensive issues such as lack of jurisdiction or venue by motion or answer, it is an anomaly to hold, as did the Court of Appeals, that the implementation of the limitation defense within the statutory period, at a time when jurisdictional and venue issues had not yet

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[4] Upon the entry of the adverse Order (A. 80) Unterweser timely (August 8, 1968) moved the District Court to certify the question. (A. 84). This motion was denied on January 16, 1969, (A. 84) on the ground that it had been mooted by commencement of the limitation action. While it is not certain that the District Court would have certified its order, in view of subsequent developments it is reasonable to suppose the court would have so acted. In any event, if the court had acted earlier Unterweser would have known whether an interlocutory appeal was available before it was necessary to make the decision to file a complaint in limitation.

been determined, operated as a "submission" or "waiver" of those undetermined issues.[5]

In its limitation complaint Unterweser carefully preserved its right to proceed in London and asserted that English law, or alternatively, German law, was applicable:

> "Accordingly, Plaintiff asserts herein, as it asserted in the pending action by motion filed on January 29, 1968, to dismiss said action on the ground of lack of jurisdiction, or alternatively, for entry of an order declining jurisdiction and/or staying the further prosecution of these proceedings, on which no ruling has been entered to date, that the proper forum for prosecution of claims by the owner of the drill barge CHAPARRAL is the High Court of Justice, London, England. Plaintiff reserves all rights under aforesaid motion and re-asserts herein

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[5] Judge Wisdom and Mr. Justice Karminsky were of the opinion that Unterweser had not precluded itself from seeking enforcement of the forum clause by filing the limitation action:

> "Unterweser filed a limitation action one week before the time for filing lapsed because the district court had not yet ruled on its motion to dismiss. I do not believe it is thereby estopped from pressing its motion to dismiss." (Wisdom J., dissenting, A. 281).
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> "It is alleged that the Plaintiffs here have to some extent taken part in the Florida proceedings. That is true: they have indeed filed a Petition For Limitation, because if they did not do that within a certain time, namely six months, they would be out of time for limitation before that tribunal. But I have no doubt at all that they have taken no steps in the Florida Court at Tampa, except to protect their position for the future." (Opinion, High Court of Justice, A. 209).
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> * * *
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> "The contention that Unterweser should be treated as having assented to the jurisdiction of the local court by filing the limitation action is a red herring." (Wisdom J., dissenting, A. 287).

> that the High Court of Justice, London, England, is the proper forum for determining all rights including that of Plaintiff to be exonerated from or to limit liability, and that in any event, irrespective of the forum, all rights of the parties including Plaintiff's right to be exonerated from or to limit liability must be determined in accordance with the law of England or alternatively the law of Germany hereinabove alleged." (A. 92).

Similarly, in its counterclaim, Unterweser reserved its right to proceed in London. (A. 114). The counterclaim, being compulsory, did not serve to waive any rights. Rule 13, Federal Rules of Civil Procedure; *Hasse v. American Photograph Corporation,* 299 F.2d 666 (10th Cir. 1962); *Neifeld v. Steinberg,* 438 F.2d 423 (3rd Cir. 1971).

C. Limitation By Answer Affords No Protection In Multiple Claim Cases, And In Any Event Limitation By Answer Is Fraught With Risk.

Zapata argues that Unterweser could have avoided "submitting" itself to the jurisdiction of the District Court by pleading limitation by answer; yet Zapata recognizes that there existed a clear danger of numerous claims. (Zapata Brief, 13-14). The law is clear that limitation by answer affords complete protection only when all possible claimants are parties to the initial action, and a shipowner, in order to be assured that he might limit his liability to the value of his vessel, must file a complaint in limitation within the statutory period. *The Scotland,* 105 U.S. 24 (1881); *Kutger v. United States,* 169 F. Supp. 104 (N.D. Fla. 1958) (Unterweser Reply Brief in Court of Appeals, 10-12).

Limitation by answer subjects the shipowner to substantial risks even in a case where it is absolutely certain that there will be but a single claim. The dilemma is succinctly stated by Gilmore and Black:

> Pre-1936 practice permitted the Limitation Act to be raised by way of defense as an alternative to an affirmative petition. There are at least three possible constructions of the 1936 preamble as it bears upon the practice of introducing the Limitation Act as a defense: 1) the six months period relates only to procedure when an affirmative petition is filed; hence the pre-1936 practice is still available and the Act may be pleaded as a defense in any suit without reference to time; 2) the six months period applies both to defensive pleading and affirmative petition; hence the Act may be pleaded as a defense but only within the six months period; 3) the filing of a petition for limitation within the six months period is now the exclusive method by which a shipowner may invoke the Limitation Act; hence the possibility of pleading the Act as a defense does not exist even during the six months period, and on receiving notice of claim the vessel owner must if he wishes to avail himself of the Act's protection, promptly file his petition. *On the whole the first solution* (that the pre-1936 practice is not affected by the amendment) *has most to recommend it, but, until the Supreme Court has read the riddle the prudent practitioner should of course assume the worst* (or third solution) *and always proceed by filing his petition within the six months period.* Gilmore and Black, *The Law of Admiralty* (1957), pp 684-685. (emphasis added) (footnotes omitted).

Faced with a $3,500,000 claim, Unterweser could not accept the risk that limitation, asserted by answer, would be invalid. On the date the statute would have run (July 12, 1968) the District Court had not ruled on Unterweser's initial motion; therefore, limitation by answer, if utilized, would have been filed after expiration of the statute.

REPLY TO POINT II

A. The Forum Provision Of The Towage Contract Is Unambiguous And Is All-Inclusive.

Zapata's argument that the forum provision is not all-inclusive or that it is ambiguous, raised in this Court for the first time, is makeweight if not specious. Unterweser brought the explicit language of the forum clause to the attention of the District Court on two separate occasions: First, in its motion to dismiss or decline jurisdiction (A. 19), and in its motion to stay the limitation action. (A. 205). Moreover, the Court of Appeals considered the effect of the forum clause on two separate occasions: in the initial hearing before the three judge panel, and subsequently by the Court *en banc*. Neither the United States courts nor the English courts have found the clause ambiguous. None of the courts have suggested that the forum clause is not preclusive or that the clause does not encompass the action Zapata initiated in Tampa.

B. Irrespective Of Whether The Forum Clause Covers In Rem Disputes, Zapata Has Received The Advantage Of In Rem Procedure.

It is difficult to perceive how the forum clause could be more inclusive; in plain English it covers "Any disputes." To suggest as does Zapata that the forum provision does not cover *in rem* proceedings is without merit. Reliance on *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), is misplaced. The bill of lading construed in *Carbon Black*, being a contract of adhesion, is distinguishable from the freely negotiated Towage Contract under consideration. Moreover, as indicated by the Fifth Circuit in its *Carbon Black* decision, 254 F.2d 297, 300, and in its decision below (A. 240), use of *"Any Action"* plainly refers to both *in rem* and *in personam*

suits. Finally, to suggest that a forum claue is intended to cover *in personam* actions and not proceedings *in rem,* is to impute " . . . to the parties the drawing of a distinction the purpose of which is impossible to grasp." *SS Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180, 184-185 (Harlan J., dissenting).[6] The forum clause expressed the clear intent that Unterweser was not to be subjected to *in rem* or *in personam* proceedings in numerous jurisdictions while performing the Towage Contract—*all disputes were to be resolved in London.*

Zapata's suggestion—to hold the forum clause applicable to *in rem* suits would destroy Zapata's right to obtain security—is pure sophistry. Although the forum clause covers proceedings *in rem,* this is not such a significant factor as to furnish a basis for refusal to enforce, for in return for its right to proceed *in rem,* Zapata obtained a very favorable towing rate.[7] (A. 295-297) (Unterweser Brief, 24). In any event, the significant aspect of an *in rem* action is its security value and Zapata has been fully secured; in the initial action by a letter of undertaking in the amount of $3,500,000, and in the limitation action by a bond in the amount of $1,390,000. (A. 19, 95): *And Unterweser advised both the District Court and Zapata that the security posted in Tampa would be made available to Zapata as security for any claim Zapata might wish to initiate in London.* (A. 275). Whatever value the *in rem* claim had for security, that purpose has been fully served.

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[6] Certainly, "Any disputes" encompasses *all actions.*

[7] Zapata, by emphasis, creates an auroa of inviolability as to *in rem* rights. However, maritime liens may be waived by "agreement or otherwise." Benedict on Admiralty (6th ed.) §89. As Zapata recognizes, the unique function of *in rem* suits is to obtain security for the claim; but once security is obtained the suit is no different from any other.

REPLY TO POINT III

A. The "Public Policy" Of The United States Expressed In Bisso Is Inapplicable To This Case; If Bisso Was Intended To Cover International Contracts The Holding Should Be Reassessed.

Zapata argues that enforcement of the forum provision would be contrary to the "public policy" of the United States, citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1963). The possibility that implementation of the forum provision (and the Towage Contract) might contravene some public policy of the United States, when coupled with Zapata's American citizenship, were significant factors in the Court of Appeals' refusal to enforce the agreement. (A. 242-243).

The policy enunciated in *Bisso* has no application in this case; a case involving neither a domestic nor a contract of adhesion. The forum clause was bargained for consideration, Zapata receiving *quid pro quo* in the form of the lowest towing rate. Zapata, an international corporation, is not a ward of the United States courts. Moreover, Zapata and its wholly owned subsidiary contract for foreign forums and application of foreign law. (A. 310-311). The casualty occurred on the high seas, *not* within the jurisdiction of the United States. The presence of Unterweser in United States' jurisdiction results from following Zapata's instructions to come to Tampa subsequent to the casualty, coupled with Zapata's breach of the Towage Contract by commencing the initial action in Tampa.

In view of such significant distinctions, refusal to implement the forum clause on grounds of United States public policy constitutes an unmerited and surely unintended extension of *Bisso*. (A. 272-273).

Unterweser seeks to have all disputes resolved in London and asserts that English law is applicable. Assuming, *arguendo,* that the exculpatory provisions of the Towage Contract would, in accordance with English law, be enforced, this fact is not contrary to *Bisso* or to any public policy of the United States. Indeed, how could action by an English court in passing on an international contract involve the public policy of the United States?

The "public policy" against exculpatory clauses is not so strong as indicated by the Court of Appeals, and it clearly is not as pervasive as argued by Zapata. This Court has in the past recognized the validity of exculpatory provisions in maritime contracts and in *Sun Oil Co. v. Dalzell Towing Co.,* 287 U.S. 291 (1932), in enforcing pilotage clauses, this Court stated:

> "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. 'There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, *the highest public policy is found in the enforcement of the contract which was actually made.*'"
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> * * *
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> *"It would be unconscionable for petitioner upon occurrence of a mishap to repudiate the agreement upon which it obtained the service."* 287 U.S. 291, 294-295. (emphasis added).

One commentator notes that distinction between "towage" and "pilotage" is elusive and:

> "... the concept of perfectly valid contractual provisions exempting from all liability for negligence is not foreign to American jurisprudence; ..." Zammit, *The Validity of the "Pilotage Clause" in Docking Assistance Contracts,* Journal of Maritime Law and Commerce (vol. 3, No. 1, p. 71, Oct. 1971) at pages 75-77.

The Fifth Circuit enforces exculpatory clauses which fall without the ambit of its *"mare nostrum."* (A. 242). In *Seaboard Coast Line R.R. v. Tennessee Corp.,* 421 F.2d 970 (5th Cir. 1970), the Court upheld implementation of an exculpatory clause.

Insofar as *Seaboard* v. *Tennessee Corp.* recognized predominate commercial considerations it is no different from this case which involves a new field of towage with unknown dangers and unacceptable risks which must be allocated by contract or insurance.

The validity of exculpatory provisions (and the enforcement of forum clauses) must be resolved by pragmatic consideration of basic economic factors concerning allocation of risk, and not by blind incantation of "public policy." Indeed, the very existence of *Bisso* "public policy" is subject to grave doubt when it can be avoided, by *domestic contracting partners,* through the simple expedient of requiring the owner of the towed object to provide insurance against the tug's negligence. *Fluor Western, Inc. v. G. & H Offshore Towing Co., Inc.,* 447 F.2d 35 (5th Cir. 1971); *Calcasieu Chemical Corporation v. Canal Barge Company,* 404 F.2d 1227 (7th Cir. 1969); *Tenneco Oil Co. v. Tug Tony,* 324 F. Supp. 334 (S.D. Tex. 1971); *Slade, Inc. v. Samson Towing Company,* 327 F. Supp. 555 (E.D. Tex. 1970); *Bisso v. Inland*